

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 30186 (Sub-No. 3)

TONGUE RIVER RAILROAD COMPANY, INC.—CONSTRUCTION
AND OPERATION—WESTERN ALIGNMENT

Decided: November 18, 2003

By motion filed November 13, 2003, Tongue River Railroad, Inc. (TRRC)¹ seeks a protective order under 49 CFR 1104.14 to provide a procedure for protecting the confidentiality of proprietary information that may be divulged during discovery in this proceeding. TRRC filed the motion in anticipation of the deposition of its President, Mr. Mike Gustafson, scheduled to be taken by the Northern Plains Resource Council, Inc. (NPRC) on November 19, 2003.²

NPRC replied, claiming generally that the order sought by TRRC is overly broad. NPRC asserts that the protective order, as sought, would give TRRC unilateral discretion to label matters confidential or highly confidential, thereby precluding NPRC from disseminating information to its members or the public in general. NPRC points out that the instant case differs from rate and trackage rights proceedings, where the Board routinely issues protective orders to keep sensitive information out of the public domain. NPRC argues that the protective order request should be denied without prejudice to a request for a protective order for specific information in the deposition that may reveal confidential information.

Good cause exists to grant the motion for a protective order. NPRC's principal concern appears to be that TRRC will be overly broad in its use of a confidentiality designation, thereby precluding TRRC from divulging to its members non-sensitive information that may prove useful

¹ In a decision served September 2, 2003, the Board allowed Tongue River Railroad Company, Inc. to be substituted for Tongue River Railroad Company as the applicant in the Tongue River III proceeding. The United Transportation Union-General Committee of Adjustment and the United Transportation Union-Montana State Legislative Board jointly filed a petition for reconsideration of that decision on September 22, 2003. That petition is under administrative review. In the instant decision, the applicant/petitioner will be referred to collectively as TRRC.

² It is noted that, although the deadline for comments on TRRC's supplemental evidence was November 12, 2003, in the comments submitted that day NPRC stated it may still seek to supplement its comments with the transcript of the November 19 deposition. The admissibility of that evidence is not now before the Board.

in formulating their opposition to the construction proposal. However, there is no reason at this time to question whether TRRC will act in good faith in asserting that a particular item should be withheld from the public. NPRC's counsel, after signing an appropriate non-disclosure agreement, will be able to review any confidential information and may then challenge before the Board the confidentiality designation chosen by TRRC. The Board will then be able to redress any inappropriate suppression of non-public information. NPRC is thus premature in its opposition to TRRC's request.

It is important that sensitive material from the deposition or from other sources be protected. While it is true, as NPRC observes, that there will likely be less information requiring confidentiality in this proceeding than in rate or trackage rights cases, there will probably be information divulged at the deposition that is properly deemed confidential. The unrestricted disclosure of any confidential, proprietary, or commercially sensitive material could cause serious competitive injury, and the grant of a protective order is warranted. Issuance of the requested protective order will ensure that the material, produced in the deposition or otherwise, will be used only in connection with this proceeding and not for any other business or commercial purpose.

Parties are reminded that the Board clarified the requirements of 49 CFR 1104.14(a) and 1104.3(b)(4) in a recent decision.³ There, the Board stated that, when filing a Highly Confidential Version, the filing party does not need also to file a Confidential Version with the Board, but must make available (simultaneously with the party's submission to the Board of its Highly Confidential Version) a Confidential Version⁴ reviewable by any other party's in-house counsel or a list of all "highly confidential" information that must be redacted from its Highly Confidential Version prior to review by in-house counsel. Also, a party must file a public version of its submission with any Highly Confidential or Confidential Version it chooses to file.

It is ordered:

1. TRRC's motion for a protective order is granted.
2. The parties are directed to comply with the protective order in the appendix to this decision.

³ Procedures to Expedite Resolution of Rate Challenges to Be Considered under the Stand-alone Cost Methodology, STB Ex Parte No. 638 (STB served Apr. 3, 2003), reconsideration denied (STB served July 31, 2003).

⁴ This Confidential Version may be served on other parties in electronic format only.

3. This decision is effective on its service date.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary

APPENDIX

PROTECTIVE ORDER

1. Any party responding to questions at a deposition, or producing material in discovery to another party to this proceeding, or submitting material in pleadings or evidence, that the party believes in good faith reveals proprietary or confidential information, may designate such responses and/or designate and stamp such material as “CONFIDENTIAL” (collectively “Confidential Material”), and such Confidential Material must be treated as confidential. Confidential Material, including any transcripts or copies thereof, and any data or notes derived therefrom may be disclosed only to employees, counsel, or agents of the party receiving such transcripts or materials who have a need to know, handle, or review the material for purposes of this proceeding and any judicial review proceeding arising therefrom, and only where such employee, counsel, or agent has been given and has read a copy of this Protective Order, agrees to be bound by its terms, and executes the attached Undertaking for Confidential Material prior to receiving access to such materials.

2. Any party responding to questions at a deposition, or producing material in discovery to another party to this proceeding, or submitting material in pleadings or evidence, may in good faith designate such responses and/or designate and stamp particular response or material as “HIGHLY CONFIDENTIAL” (Collectively, “Highly Confidential Material”). Highly Confidential Material may be disclosed only to another party’s outside counsel or record in this proceeding, and to those individuals working with or assisting such counsel who are not regular employees of the party and have a need to know, review, or handle the Highly Confidential Material for purposes of the proceeding, provided each such person has been given and has read a copy of this Protective Order, agrees to be bound by its terms, and executes the attached Undertaking for Highly Confidential Material prior to receiving access to such materials.

3. If during the course of a deposition any party inquires into areas that the party being deposed deems Confidential or Highly Confidential, that party shall so advise counsel for the party taking the deposition and all other counsel attending the deposition. In that event, attendance at any portion of the deposition during which the deponent testifies as to matters that are deemed by the party being deposed to be Confidential or Highly Confidential in nature, or involving materials that have been designated as Confidential or Highly Confidential under the terms of this Protective Order, shall be restricted to persons who have executed the appropriate Undertaking under this Protective Order and such persons shall be governed by the limitations on disclosure and use of such testimony set forth in this Protective Order. All portions of depositions transcripts and/or exhibits that address, consist of or disclose testimony adduced at the deposition that a party has designated as Confidential or Highly Confidential under the terms of this paragraph, or that relate to materials that have been designated Confidential and/or Highly

Confidential, shall be kept under seal and treated as Confidential and/or Highly Confidential Materials in accordance with the terms of this Protective Order.

4. Each Undertaking for Confidential Material and Undertaking for Highly Confidential Material executed by a person authorized to receive access to Confidential Material or Highly Confidential Material shall be kept for the duration of this proceeding and any related court litigation or judicial appeals by the party with which such person is affiliated or associated, and a copy of each such Undertaking shall be served upon counsel of record for each party no later than 10 days after such Undertaking is executed.

5. Confidential Material and Highly Confidential Material shall be used by a receiving party solely for the purposes of this proceeding and any judicial review proceeding arising therefrom, and not for any other business, commercial, or competitive purpose.

6. Confidential Material and Highly Confidential Material that is not the receiving party's own data, information, or documents must be destroyed by the receiving party, its employees, counsel, and agents at the completion of this proceeding and any judicial review proceeding arising therefrom, except that: (1) outside counsel (but not outside consultants) for each party are permitted to retain file copies of all pleadings and evidence filed with the Board and file copies of all work product; and (2) in-house counsel for each party are permitted to retain file copies of all pleadings and evidence which they received during the course of this proceeding.

7. Confidential Material and Highly Confidential Material, if contained in any pleading or evidence filed with the Board, shall, in order to be kept confidential, be filed only in pleadings or evidence submitted in a package clearly marked on the outside "Confidential Materials Subject to Protective Order" or "Highly Confidential Materials Subject to Protective Order." See 49 CFR 1104.14.

8. In the event that a party produces material which should have been designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" and inadvertently fails to stamp the material as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL," the producing party may notify the other parties in writing within 10 days of discovery of its inadvertent failure to make the confidentiality designation. The parties who received the material without the confidentiality designation will return the non-designated portion or destroy it, as directed by the producing party, or take such other steps as the parties agree to in writing. The producing party will promptly furnish the receiving parties with properly designated material.

9. If any party intends to use Confidential Material and/or Highly Confidential Material at hearings in this proceeding, or in any judicial review proceeding arising therefrom, the party so intending shall submit any proposed exhibits or other documents setting forth or revealing such Confidential Material and/or Highly Confidential Material to any Administrative Law Judge, the Board, or the court, with a written request that the Administrative Law Judge, the Board, or the

court: (a) restrict attendance at the hearings during discussion of such Confidential and/or Highly Confidential Material; and (b) restrict access to the portion of the record or briefs reflecting discussion of such Confidential and/or Highly Confidential Material in accordance with the terms of this Protective Order.

10. Except for this proceeding, the parties agree that if a party is required by law or order of a governmental or judicial body to release Confidential or Highly Confidential Material produced by the other party or copies or notes thereof as to which it obtained access pursuant to this Protective Order, the party so required shall notify the producing party in writing within 3 working days of the determination that the Confidential Material, Highly Confidential Material, or copies or notes are to be released or within 3 working days prior to such release, whichever is soonest, to permit the producing party to contest the release.

11. All parties must comply with all of the provisions stated in this Protective Order unless good cause, as determined by the Board, or by an Administrative Law Judge in a decision from which no appeal is taken, warrants suspension of any of the provisions herein.

12. Information that is publicly available or obtained outside of this proceeding from a person with a right to disclose it shall not be subject to this Protective Order even if the same information is produced and designated as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" in this proceeding.

13. A "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL" designation may be removed by consent of a party who asserts the confidential, proprietary, or commercially sensitive interest, or, absent such consent, by appropriate decision of the Board, or of an Administrative Law Judge from which no appeal is taken, upon application of a party seeking to remove such designation.

**UNDERTAKING
CONFIDENTIAL MATERIAL**

I, _____, have read the Protective Order served on November 18, 2003, governing the production of confidential documents in STB Finance Docket No. 30186 (Sub-No. 3), understand the same, and agree to be bound by its terms. I agree not to use or permit the use of any confidential data or information obtained pursuant to this Undertaking for any purposes other than the preparation and presentation of evidence and argument in STB Finance Docket No. 30186 (Sub-No. 3) or any judicial review proceeding arising therefrom. I further agree not to disclose any confidential data or information obtained under this Protective Order to any person who is not also bound by the terms of the Order and has not executed an Undertaking in the form hereof. At the conclusion of this proceeding and any judicial review proceeding arising therefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultants working with me, provided, however, that outside counsel (but not outside consultants) may retain file copies of its work product and of pleadings and evidence filed with the Board, and in-house counsel may retain file copies of all pleadings and evidence containing confidential material it received during the course of this proceeding. I further understand that a party may retain its own confidential material.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that a party which asserts the confidential interest shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach. I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

Dated: _____

**UNDERTAKING
HIGHLY CONFIDENTIAL MATERIAL**

As outside [counsel] [consultant] for _____, for which I am acting in this proceeding, I have read the Protective Order served on November 18, 2003, governing the production of confidential documents in STB Finance Docket No. 30186 (Sub-No. 3), understand the same, and agree to be bound by its terms. I also understand and agree, as a condition precedent to my receiving, reviewing, or using copies of any documents designated "HIGHLY CONFIDENTIAL," that I will limit my use of those documents and the information they contain to the preparation and presentation of evidence and argument in STB Finance Docket No. 30186 (Sub-No. 3) and any judicial review proceeding arising therefrom, that I will take all necessary steps to ensure that said documents and information will be kept on a confidential basis by any outside counsel or outside consultants working with me, that under no circumstances will I permit access to said documents or information by personnel of my client, its subsidiaries, affiliates, or owners, except as otherwise provided in the Protective Order, and that at the conclusion of this proceeding and any judicial review proceeding arising therefrom, I will promptly destroy any copies of such designated documents obtained or made by me or by any outside counsel or outside consultant working with me, provided however, that outside counsel (but not outside consultants) may retain file copies of its work product and of any pleadings and evidence filed with the Board. I further understand that I must destroy all notes or other documents containing such highly confidential information received from the other party in compliance with the terms of the Protective Order. Under no circumstances will I permit access to documents designated "HIGHLY CONFIDENTIAL" by, or disclose any information contained therein to, any persons or entities for which I am not acting in this proceeding.

I understand and agree that money damages would not be a sufficient remedy for breach of this Undertaking and that a party which asserts the confidential interest shall be entitled to specific performance and injunctive or other equitable relief as a remedy for any such breach. I further agree to waive any requirement for the securing or posting of any bond in connection with such remedy. Such remedy shall not be deemed to be the exclusive remedy for breach of this Undertaking but shall be in addition to all remedies available at law or equity.

OUTSIDE [COUNSEL][CONSULTANT]

Dated: _____